No. 150.

Brief of Morris for P. E.

BRIEF FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.
No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS,
as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN A. SMITHSON,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

HOWARD MORRIS,
THOMAS H. GILL,
Counsel.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

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BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the District Court for Ramsey County, State of Minnesota, October 2d, 1895, to recover from the plaintiffs in error and the Chicago Great Western Railway Company, a corporation under the laws of the State of Illinois, as defendants, damages for injuries to the person of said Smithson. (Record, p. 9.)

At the time of the injury said Smithson was a servant employed as locomotive fireman upon the line of the Chicago Great Western Railway Company running westerly from the City of Chicago, Illinois. (Record, p. 11.) The Receivers and the Chicago Great Western Railway Company used the same tracks in reaching the terminal station in Chicago, and the engine on which Smithson was engaged ran into an engine manned by employes of the Receivers, stopped by them, and standing on the

main outgoing track in the City of Chicago, on the night of March 7th, 1894. (Record, p. 12.)

Within the time fixed by law the Receivers filed a proper petition and bond for the removal of the action into the United States Circuit Court for the District of Minnesota, basing the right claimed upon the fact of the appointment of the Receivers by the United States Circuit Courts of Wisconsin and Minnesota, upon the diverse citizenship of the parties, that no cause of action existed in fact or was stated against the defendant the Chicago Great Western Railway Company, and that said Railway Company was joined as a defendant collusively for the purpose only of preventing a removal of said cause, and that the causes of action against the defendants, if any, were separable and distinct. (Record, pp. 16-18.)

The plaintiff filed a motion to remand from said United States Circuit Court based upon an answer so-called denying collusively joining defendants to prevent removal, and the action was remanded. (Record, pp. 20-22-24.) The defendant Receivers answered under stipulation and went to trial in the State Court, preserving objections to the jurisdiction of that Court. (Record, p. 26.)

At the close of the plaintiff's evidence and upon motion, a verdict was directed as to the defendant the Chicago Great Western Railway Company. (Record, p. 35.) Thereupon the Receivers immediately filed a new petition and bond for removal based upon their right as officers of a Federal Court and as non-resident defendants. (Record, pp. 30-34.) The right to the removal was denied, and the trial proceeding, verdict and judgment followed for the plaintiff. (Record, p. 117.) An appeal to the Supreme Court of Minnesota resulted in an affirmance. (Record, p. 130.)

The writ of error herein is prosecuted to review the judgment of the Supreme Court of the State of Minnesota denying the right of removal.

ASSIGNMENT OF ERRORS.

1st. The State Court erred in assuming jurisdiction of the parties and subject-matter of this action upon remand from the

United States Circuit Court for the District of Minnesota, Third Division.

2nd. The State Court erred in denying the motion of the defendant Receivers, the plaintiffs in error here, for permission to file an amended answer therein, pleading to the jurisdiction of said Court.

3rd. The State Court erred in overruling the objections of the defendant Receivers, plaintiffs in error here, to the jurisdiction of said Court to hear, try and determine this action.

4th. The State Court erred in denying defendant Receivers' motion upon their proper petition and bond for the removal of this action to the United States Circuit Court for the District of Minnesota, Third Division, presented immediately following the dismissal of the cause of action as against the Chicago Great Western Railway Company at the close of the plaintiff's case.

5th. Said State Court did err in exercising jurisdiction in said cause and in trying and determining the same and rendering judgment therein, in that it denied to the defendants therein, the plaintiffs in error here, the right, privilege and immunity specially set up therein, under the statute and authority of the United States, of their removal of and their right to remove said cause from said State Court into said Circuit Court of the United States.

SYNOPSIS OF ARGUMENT.

The State Court erred in denying the application of the Receivers for removal into the Circuit Court of the United States for the District of Minnesota, upon the petition and bond presented at the close of the plaintiff's evidence and after a verdict had been directed for the defendant the Chicago Great Western Railway Company, and in thereafter proceeding to verdict and judgment in said cause.

The original petition of the Receivers showed upon its face rights of removal based upon two jurisdictional grounds; first, diverse citizenship and separable controversy, and, second, that the action was against federal receivers for alleged negligence growing out of their operation of the property, and that no

cause of action was stated against the co-defendant who was joined merely to prevent removal.

Upon both grounds, or either, the removal was a matter of right if correctly applied.

As to the first:

Ayres *vs.* Wiswall, 112 U. S., 187.
Beuttel *vs.* C., M. & St. P. R'y Co., 26 Fed. Rep., 50.
N. Y. Construction Co. *vs.* Simon, 53 Fed., 1.
Barney *vs.* Lathan, 103 U. S., 205.
Bacon *vs.* Rives, 106 U. S., 99.
Fergason *vs.* R'y Co., 63 Fed., 177.
Over *vs.* Lake Erie & W. R. Co. et al., 63 Fed., 34.
Warax *vs.* R'y Co., 72 Fed., 637.
Hukill *vs.* R'y Co., 72 Fed., 745.
Hartshorn *vs.* R'y Co., 77 Fed., 9.
17 A. & E. Encl., 602-604.

As to the second:

Landers *vs.* Felton, 73 Fed., 311.
Lund *vs.* C., R. I. & P. R'y Co., 78 Fed., 385.
Carpenter *vs.* N. P. R. Co., 75 Fed., 850.
Lanning *vs.* Osborne, 79 Fed., 657.
McNulta *vs.* Lochridge, 141 U. S., 327-331.
Jewett *vs.* Whitcomb et al., 69 Fed., 417.
Bock *vs.* Perkins, 139 U. S., 628.
Wood *vs.* Drake, 70 Fed., 881.
Rouse *vs.* Hornsby, 161 U. S., 588.
Gableman *vs.* P. D. & E. R. Co. et al., 82 Fed., 790.

The cause was remanded by the Circuit Court on the theory that the complaint stated a joint cause of action on the authority of the case of

Thompson *vs.* R. R. Co., 60 Fed. Rep., 773.

The order of remand was final as to this case upon the first petition.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.
Powers *vs.* R. R. Co., 169 U. S., 92.

When, however, the direction of a verdict at the close of the plaintiff's case was made in favor of the co-defendant Railway Company, the cause then became in fact removable by the Receivers, and their application to remove should have been granted.

Huskins *vs.* R. R. Co., 37 Fed. Rep., 504.
Evans *vs.* Dillingham, 43 Fed. Rep., 177.
Yarde *vs.* B. & O. R. R. Co., 57 Fed. Rep., 913.
Mattoon *vs.* Reynolds, 62 Fed. Rep., 417.
Cookerly *vs.* R'y Co., 70 Fed. Rep., 277.
Yulee *vs.* Vose, 99 U. S., 539.
Powers *vs.* R. R. Co., 65 Fed. Rep., 129.
Hukill *vs.* R. R. Co., 65 Fed. Rep., 138.
Arrowsmith *vs.* R. R. Co., 57 Fed. Rep., 165.
Arapahoe County *vs.* K. P. R. Co., 4 Dillon, 277.
Powers *vs.* C. & O. R. Co., 169 U. S., 92.
Bailey *vs.* Mosher, 95 Fed. Rep., 223.

The cause thus being in fact removable, the refusal of the trial Court to transfer the cause was a denial of a right set up under the laws of the United States, and the holding of the State Court is reviewable here.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.

ARGUMENT.

The Receivers seasonably sought to remove this case into the United States Court, deeming it removable. The co-defendant, though also a non-resident of Minnesota, did not join in the proceedings, and the cause was remanded upon the plaintiff's motion. The determination of lack of jurisdiction in the Federal Court turned upon the doctrine that the plaintiff's statement of a joint action in tort against the defendants, if joint in fact as well as several, controls upon the question of separable controversy. The decision distinctly relied upon that authority.

Thompson *vs.* R'y Co. et al., 60 Fed., 773.

But the removal was actually based not only upon diverse citizenship and a separable controversy, but also upon the right

arising when the construction of an act of Congress might be brought into question. The Receivers were acting under appointment of a Federal Court.

T. & P. R'y Co. *vs.* Cox, 145 U. S., 593.
Landers *vs.* Felton, 73 Fed., 311.

However, the remanding order was probably final as far as the first petition and the record at that time was concerned.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.
Powers *vs.* C. & O. R'y Co., 169 U. S., 92.

The defendant Receivers proceeded thereafter upon the theory that the remanding order, based as it was upon, and meeting in fact, but one of the rights urged for removal, did not restore jurisdiction of the cause to the State Court, and objections were made and exceptions reserved upon this point.

They were forced to trial in the State Court, and all parties being represented proceeded to the close of the evidence offered by the plaintiff to establish his right to recover. The co-defendant Railway Company secured a verdict by direction of the Court, and the Receivers immediately and formally applied for a removal, which was denied, verdict and judgment against them following.

The original petition for removal had set up that the defendant, the Chicago Great Western Railway Company, was not a real party to the action, but had been joined as a defendant with the Receivers for the sole purpose of preventing the removal of this case to the Federal Court.

At every step of the trial the Receivers urged upon the attention of the trial Court this proposition, and it became evident, as will appear from the reading of the testimony, that the trial was conducted upon some understanding or agreement between the plaintiff and the defendant, the Chicago Great Western Railway Company, pursuant to the original idea that it should be made a party only for the purposes stated.

The ground of negligence relied upon against the Chicago Great Western Railway Company was its failure to establish proper rules under which to conduct the business upon the ter-

minal tracks which would have prevented the injury to the plaintiff, but we search in vain for one single word of testimony produced upon the direct examination of the plaintiff himself, or any of his witnesses, tending to establish a particle of right to recover against that company upon the ground stated. The plaintiff's counsel was singularly silent with regard to any evidence whatsoever to sustain his alleged cause of action against that company. The entire evidence upon that subject was voluntarily elicited by the counsel for the Great Western Company. In other words, without any attempt of any kind on the part of the plaintiff to prove his alleged cause of action, the defendant thoughtfully provided against recovery. If the Great Western Company's counsel had not been present, not a syllable would have been offered in the evidence in any wise tending to connect the Great Western Company with the injury. It was intended that it should not. Not even a feeble effort was made to resist the motion of the Great Western Company's counsel for a directed verdict at the close of the plaintiff's case, and, indeed, none could be, for there had been absolutely no showing made upon which the Great Western could have been held, and the State District Judge, in granting the directed verdict, plainly stated that ample rules had been established, which fact, of course, it would be ridiculous to assert the plaintiff and his counsel did not know.

It will not be disputed that there is ample authority to establish the proposition that where an action is brought against two defendants, one of whom is entitled to remove, and the plaintiff voluntarily dismisses as to the resident defendant, whose presence in the case has prevented a removal, even though it be long after the time within which removal could originally have been had, the changed conditions justify, and, indeed, require the Court to grant the application for removal.

And it is likewise established that where for the purpose of defeating removal, the plaintiff brings an action for an amount less than the jurisdictional sum required by the United States statutes, and afterward, even at the close of the testimony and based upon the evidence adduced, the plaintiff applies to in-

crease the *ad damnum* above the jurisdictional amount and such application is allowed, the defendant may then remove.

In the case at bar, counsel for the plaintiff carried the litigation, knowing it to be within their control, one step further, and instead of dismissing after the period for removal had expired or when called for trial permitted the matter to run until the close of the testimony, thus hoping to establish by greater appearance of good faith, that the joinder of defendants had not been collusive.

In Huskins *vs.* Cincinnati, N. O. & T. P. Ry. Co., 37 Fed., 504, an action was brought against the defendant, a non-resident, in which damages were laid at the sum of $2,000 and upon which removal could not be had. After issue joined, the plaintiff procured an amendment increasing the *ad damnum* clause to $10,000, and afterward, the time for removing under the original bond having expired, the defendant filed a petition and bond for removal upon the increased claim for damages.

The Court say:

"In general phrase and in most respects, the amendment increasing the damages did not create a new suit, but so far as the jurisdiction of this Court is concerned it was new, and a liberal interpretation will be allowed to prevent the flagrant and intentional defeat of its jurisdiction. 'If the defendant have a right to the removal, he cannot be deprived of it by the allowance by the State Court of an amendment reducing the sum claimed after the right of removal is complete.' Speer, Rem. Causes, 81; Kanouse *vs.* Martin, 15 How., 198. This being true, is not the converse of the proposition true; that is, that a person not entitled to a removal who becomes entitled to it, so far as the jurisdictional amount is concerned, by reason of an amendment allowed by the State Court after the time had elapsed within which his removal of the suit might have been made, shall not be deprived of his right to remove the suit? The reasons why the removal of the cause should not be defeated in one case apply with equal cogency to the other. Had the defendant filed its petition and bond for removal the moment after the amendment was made increasing the damages claimed, his attitude in the case would have been in nowise changed from that which it occupies."

In Evans *et al. vs.* Dillingham *et al.*, 43 Fed., 177, the Court says:

"There is no question in my mind that where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an illustration of the propriety and necessity of so holding, take the case where a party sues in the State Court alleging the cause of controversy to be of less value or not of greater value than $2,000, and after the return term and after the defendant has answered, the plaintiff files an amended petition setting up the same cause of action but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause of action be such as to have given the right to remove had the amount in controversy been sufficient to give this Court jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original petition had passed." Motion to remand refused.

In Yarde *vs* B. & O. R. Co., 57 Fed., 913, upon this subject the Court says:

"The right of the removal is secured by the Constitution and laws of the United States whenever the requisite diversity of citizenship exists, and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. The right cannot be defeated by any artifice, evasion or omission. If at any time during the progress of an action in a State Court, by amendment or otherwise, a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or a citizen of another state than that of which the plaintiff is a citizen, has the right to file his petition and bond, and secure a removal of the cause into the proper Federal Court. It has often been held that if the defendant have a right to the removal, he cannot be deprived of it by the allowance by the State Court of an amendment reducing the sum claimed after the right of removal is complete. Kanouse *vs.* Martin, 15 How., 198. The converse of this proposition must be true—that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the State Court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made. Huskins *vs.* Railway Co., 37 Fed. Rep., 504; Evans *vs.* Dillingham, 43 Fed. Rep., 177, 180."

In Mattoon *vs.* Reynolds, 62 Fed., 417, an action was brought and an amended complaint filed claiming damages in more than the jurisdictional amount.

The Court says:

"The single question presented is whether by the filing of the substituted complaint the defendant acquired a right of removal. The determination of this question depends upon whether the amended complaint states a new and different cause of action and one in which the original suit is merged. It is clear that in this case the second count presents a distinct cause of action, fraud, calling for a distinct remedy at law; money damages. The allegations contained in the first count and the relief therein prayed are incorporated in the second count."

Motion to remand denied.

Cookerly *vs.* Railway Company, 70 Fed., 277, was an action brought in the State Court against three defendants. On the trial a motion for non-suit as against two of the defendants was granted and the remaining defendant moved at once for removal to the Federal Court. The Court says on motion to remand:

"This case comes fairly within the rule established by the decision of the Supreme Court in the case of Yulee *vs.* Vose, 99 U. S., 539-546, in which case the petition for removal was filed after the case had been severed as to certain defendants by the decision of the Court of Appeals of New York which terminated the case as to some of the defendants, leaving it pending for a second trial as against the defendant Yulee alone. * * * * The Supreme Court held that the changed situation by the termination of the action as to some of the defendants entitled the one remaining defendant to then exercise the right of removal and based the decision distinctly on the ground that the joinder of other defendants prevented Yulee from removing the case prior to the first trial in the State Court. * * * * I acquit the plaintiff of any fraudulent purpose in joining McKenzie and Glenn as co-defendants."

The case of Yulee *vs.* Vose, 99 U. S., 539, is sufficiently stated in the foregoing citation:

In Powers *vs.* Chesapeake & Ohio R. Co., 65 Fed., 129, an action was brought against the railroad company for personal injuries arising out of the negligence of employes, and the servants at fault were joined with the company as defendants. Being residents of the same state with the plaintiff, a removal was thus prevented. Within the time, however, a petition for removal was filed urging that the individual defendants had been joined collusively and for the purpose of preventing removal,

and on motion the cause was remanded from the Federal Court to the State Court, it being found that the plaintiff and one of the defendants were citizens of the same state. The complaint set out on its face a joint cause of action. After the case had been returned to the State Court issue was joined, and long thereafter the plaintiff dismissed his action as against the individual defendants, so that the case would then proceed entirely against the railroad company. The defendant railroad company then filed another bond for removal which, upon objection, was denied and the cause proceeded to judgment for the plaintiff in the State Court. A transcript was duly filed in the Federal Court pursuant to the second application for removal, and upon a motion there made to remand the United States Circuit Court held that the cause was properly removed on the second application, it satisfactorily appearing that the individual defendants had been joined collusively for the purpose of preventing the exercise of such right and that, consequently, the trial and judgment in the State Court were void.

This case is in principle and fact essentially like the case at bar, except, the Court will note, that in our case the plaintiff has carried his apparent good faith one additional step. He certainly knew that no ground of action existed against the Chicago Great Western Company and was therefore confident that at the proper time the Court must necessarily relieve it from the possibility of a judgment against it in case a submission could be had to the jury. But, in our opinion, it can make no difference. The course of this litigation, which is a matter of record, in the Federal Court to which the removal was attempted, though not incorporated in the record of this case, still being true, we feel at liberty to refer to it, as we are confident the learned counsel for the plaintiff will not be inclined to dispute our assertion, shows with absolute conclusiveness, we think, the intention, at all hazards, to force the consideration of this case in the State Court against the right of the Receivers to removal. The action was originally commenced by this plaintiff against the defendant Receivers in the State Court; was thence removed to the Federal Court for this district, and after a sharp contest

referred by that Court to a master for the purpose of ascertaining the facts and reporting the damages to which the plaintiff was entitled, if any. The plaintiff then dismissed his action in the Federal Court and brought this present case against the Receivers and the Chicago, Great Western Railway Company. This further fact exists in this case than existed in the case last above cited, upon which the Court based its ruling that the removal should have been had.

The argument of the Powers case is very clear and convincing, covering the ground entirely, and, it seems, must be both upon authority and upon reason conclusive of the rights of the defendant Receivers at this time to have relied upon their right of removal.

In the case of Hukill *vs.* Chesapeake & O. R. Co., 65 Fed., 138, decided at the same time and by the same Court as the case last above cited, the same ruling is made, though it appears from the facts that an application to remove while individuals were joined with the company as defendants in the Court below was not made.

In Kanouse *vs.* Martin, 15 Howard, 198, under the removal act in which the jurisdictional amount was then fixed at $500, after the action was brought demanding damages of more than the jurisdictional amount and after a petition for removal had been filed, plaintiff obtained an amendment reducing his claim to $499, and it was held that such amendment could not affect or prevent the defendant's right to remove.

The case of Powers *vs.* Chesapeake & Ohio Ry. Co., above referred to, was brought to this Court by the plaintiff below upon writ of error and upon a certificate of the question of the jurisdiction made by the trial Court, and the right of removal invoked in the case at bar at the close of the plaintiff's case and after the dismissal of the co-defendant seems to be established beyond all question.

Powers *vs.* Chesapeake & Ohio Ry. Co., 169 U. S., 92.

Upon another theory as well, we submit, that after the dismissal of the action, by direction of a verdict, as against the Chicago Great Western Railway Company, the Receivers had

absolute right to remove, although, as we contend, no clearer or greater right than existed in their favor in that regard at the filing of the original complaint. It has been shown, we think, in the preceding argument, that there was but one legal cause of action stated in the complaint, and that was for negligence against the Receivers; that no legal ground of recovery was set out as against the Chicago Great Western Company; and that in any event the action against the Receivers was founded upon an entirely different principle of law from the alleged action against the Chicago Great Western Company and in no regard could be held to be joint. This claim was finally set at rest by the action of the trial Court, which held that there was not and had not been any cause of action alleged against the Chicago Great Western Railway Company. It was the duty of the Court to disregard the attempted misjoinder of causes of action and upon the Receivers' petition, to treat the cause set out against them as though it were the sole cause of action at issue. The Receivers had defended in the trial Court entirely under protest, insisting at every step that the jurisdiction of that Court had been lost. Hence, when this contention had been thus affirmed by the State Court on the theory of but a single, separable cause of action, which was against the Receivers, their right to remove had become absolutely certain.

Arrowsmith *vs.* Ry. Co., 57 Fed., 165.
Arapahoe County *vs.* K. P. Ry. Co., 4 Dillon, 277.

In the former of these cases it was held that no cause of action was stated against the resident defendants joined for the purpose of preventing removal; and in the latter, no relief was demanded in the complaint against the same sham defendants. It was held that the joinder of such defendants without the statement of a cause of action against them did not prevent the removal. So, upon either theory, it becomes clear that the Receivers' right to change the jurisdiction after the direction of the verdict for the railway company had then become settled, first, under the original petition because it was then established that there was but a single cause of action stated and that

against the Receivers; and, second, under the second application to remove because if the complaint had originally stated a joint cause of action it was then determined that it had been collusively so stated and the case had reached a form in which the defendants might rely upon the exercise of their right.

Hence, if for any cause at this stage of the trial the Receivers' right to remove had become clear, it was the duty of the trial Court to proceed no further, and in refusing the removal it erred.

HOWARD MORRIS,
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Counsel for Plaintiffs in Error.

October, 1899.